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WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; WISCONSIN DEPARTMENT OF ADMINISTRATION; STATE BUREAU OF PROCUREMENT; SECRETARY, WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS; DIRECTOR, STATE BUREAU OF PROCUREMENT, WISCONSIN DEPARTMENT OF ADMINISTRATION; JAN RICHARDSON; AND GARY C. SHEALY,
Appellants,

v.

GOULD, INC., a Delaware Corporation,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AMICUS CURIAE BRIEF OF THE STATE OF CONNECTICUT IN SUPPORT OF APPELLANTS

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three violations of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, (NLRA) as determined by the federal courts. The Connecticut statute is very similar to the Wisconsin statutes under review here. Those statutes, Wis. Stats. §§ 16.75(8) and 101.245, also provide for a state contract prohibition on the basis of three NLRA violations within a five year period. Thus, the State of Connecticut has a substantial interest in the proper resolution of the question presented in this appeal.

The State of Connecticut files this brief in support of the appellants urging that the judgment of the U.S. Court of Appeals for the Seventh Circuit be reversed.

SUMMARY OF ARGUMENT

A state law involving an exercise of the state's contracting power is not preempted by the NLRA in the absence of an indication of Congressional intent to preempt. That conclusion is based on this Court's recent holding that state legislation under the state's police powers is not preempted by the NLRA in the absence of an indication of Congressional intent to preempt. The Wisconsin statutes involving an exercise of the state's contracting power are not preempted by the NLRA since there is no indication of Congressional intent to preempt them.

ARGUMENT

I.

THE WISCONSIN STATUTES PROHIBITING STATE PURCHASES OF PRODUCTS MANUFACTURED OR SOLD BY EMPLOYERS WHO HAVE REPEATEDLY VIOLATED THE NATIONAL LABOR RELATIONS ACT (NLRA), 29 U.S.C. § 151 ET SEQ., ARE NOT PREEMPTED BY THE NLRA

A. *The Wisconsin Statutes Are Not Preempted By The NLRA Since An Expression Of Congressional Intent To Preempt The State's Contracting Power Is Absent*

1. The State Acting As Market Participant Is Not Subject To NLRA Preemption In The Absence Of An Expression Of Congressional Intent

This Court has held that a state acting as a market participant purchasing goods and services rather than as a market regulator is not subject to the Commerce Clause of the U.S. Constitution. *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 208 (1983); *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-437 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976). This Court has further stated: "Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of Congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Hughes v. Alexandria Scrap Corp., supra*, 426 U.S. at 810. That language was expressly approved in *Reeves, Inc. v. Stake, supra*, 447 U.S. at 436, and *White v. Massachusetts Council of Construction Employers, Inc., supra*, 460 U.S. at 207. Accordingly, in the absence of Congressional action prohibiting a state from exercising its

contracting powers, the Commerce Clause does not restrain the states.

A clear expression of Congressional intent to restrict the states in the exercise of their contracting powers is required. This Court's language in *Alexandria Scrap* quoted above suggests the need for Congressional action specifically related to the state's function as market participant. Moreover, this Court was sensitive in *Alexandria Scrap* to the issue of whether Congress could constitutionally prohibit the particular kind of state market participation involved in that case. *Hughes v. Alexandria Scrap Corp., supra*, 426 U.S. at 810 n. 19. This suggests a further concern for state sovereignty in Congressional action restricting the state's contracting power. Regardless of what constitutional limitations on Congressional action may, in fact, exist, this Court's sensitivity supports the need for a clear expression of Congressional intent to encroach on the state's contracting power.

The reasoning underlying this Court's recognition of Commerce Clause exemption for the state as market participant also indicates requirements for Congressional action. A basic premise for the exemption involves considerations of state sovereignty. *Reeves, Inc. v. Stake, supra*, 447 U.S. at 438. Moreover, the states enjoy a right similar to the unrestricted contracting power of private businesses. *Id.* at 438-439 & n. 12. The burden on state market participant activities of restrictions for private businesses suggests that, "when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause." *Id.* at 439. The reference to freedom from federal constraints in general accentuates the rights of the state as market participant. The above rationale in *Reeves* thus provides further basis for requiring Congressional intent to impinge on the state's contracting power to be clearly expressed.

In *Hayfield Northern Railroad Company, Inc. v. Chicago And North Western Transportation Company*, _____, U.S. _____, 104 S.Ct. 2610 (1984), this Court indicated the proper approach to Congressional action restricting state contracting powers. This Court recognized the principle that preemption is not established unless "the nature of the regulated subject matter permits no other conclusion, or . . . the Congress has unmistakably so ordained." *Id.* at _____, 104 S.Ct. at 2617. In *Hayfield*, this Court held that the state's exercise of its traditional power of eminent domain over railroad property that has been abandoned required a determination that Congress had "unmistakably ordained" preemption. Moreover, the state's traditional power of eminent domain justified a refusal to hold that the regulation of abandoned railroad property "permits no other conclusion" than preemption. Accordingly, only a clear expression of Congressional intent to preempt the state's traditional eminent domain power would suffice for preemption.

The holding that preemption of the state's traditional eminent domain power requires a clear expression of Congressional intent strongly suggests a similar rule for the state's exercise of its contracting powers. Both types of powers are concerned with the state's obtaining the material resources necessary to operate state government. Moreover, the state's contracting power is similarly a traditional state function. *Reeves, Inc. v. Stake, supra*, 447 U.S. at 438-439 & n. 12. Also, the state's right, similar to a private business, to exercise freely its contracting power establishes the extent of state sovereignty in that area similar to the historic exercise of the power of eminent domain. Accordingly, a state acting as a market participant is not subject to preemption in the absence of a clear expression of Congressional intent.

This Court has recently held that an expression of Congressional intent is required for NLRA preemption of certain state regulation. In *Metropolitan Life Insurance*

Company v. Massachusetts, _____ U.S. _____, 53 U.S.L.W. 4616, 4625 (June 3, 1985), this Court held that a state's exercise of its police powers to promote public health and safety is not preempted by the NLRA in the absence of a specific indication of Congressional intent. It was recognized that Congress developed the NLRA "within the larger body of state law promoting public health and safety." *Id.* at 4625. That recognition was based on the traditionally wide latitude of the states under their police powers to legislate on matters of health and safety.

The approach with respect to NLRA preemption of state police power laws is equally applicable to the state's exercise of its traditional contracting powers, which themselves work in tandem with and support the exercise of police powers. Accordingly, the state's exercise of its contracting power should also not be preempted by the NLRA in the absence of an indication of Congressional intent to preempt.

2. Congress Has Not Expressed An Intent In The NLRA To Preempt Wisconsin's Statutory Prohibition Of State Contracts For Employers Who Have Repeatedly Violated The NLRA

The Wisconsin statutes impose a prohibition on state contracts for employers who have repeatedly violated the NLRA. Certainly the statutes constitute an exercise of the state's contracting power. The kind of exercise of that power involved here falls within the most traditional form of state market participant activities in determining the parties with whom it will deal. See *Reeves, Inc. v. Stake*, *supra*, 447 U.S. at 438-439 & n. 12. Accordingly, the Wisconsin statutes are not preempted by the NLRA in the absence of an indication of Congressional intent to preempt them.

The understanding that the Wisconsin statutes must be treated as an exercise of the state's contracting power is

confirmed by recent cases. In *White v. Massachusetts Council of Construction Employers, Inc., supra*, this Court held that a city executive order requiring construction projects funded with city funds to be performed by a work force of at least half Boston residents did not violate the Commerce Clause. The decision was based on the principle of *Alexandria Scrap* and *Reeves* that a state acting as market participant is not subject to the Commerce Clause. *Id.* at 215. This Court held that the executive order did not constitute market regulation as opposed to market participation despite its condition on employment of contractors. *Id.* at 211 n. 7. Its conclusion was based on the lack of distinct regulation of private parties in light of the city's major participation in construction projects. Construction employees could thus be regarded as "working for the city" in a substantial sense.

The key element of this Court's conclusion is its recognition that, while the executive order placed restrictions on private parties, it could, as a practical matter, be considered market participant activity because of the city's major role. This approach indicates that this Court treats restrictions imposed by a governmental entity on its own purchasing activities as a market participant function rather than a regulatory function regardless of the appearance of a regulatory purpose. Moreover, this Court concluded, specifically in response to the suggestion of market regulation, that "the executive order in this case *falls well within* the scope of *Alexandria Scrap* and *Reeves.*" *Id.* at 215 n. 7. (Emphasis supplied.)

The Wisconsin statutes provide for a simple prohibition on state contracts. Their remedy contains no aspect of market regulation in any sense. They involve a classic exercise of the state's power to determine trading partners. They must be considered an exercise of the state's contracting powers under the approach in *White* regardless of whether a purpose of the statutes was the regulation of labor relations.

In *Amalgamated Transit Union, Div. 819 v. Byrne*, 568 F.2d 1025 (3d Cir. 1977), the court plainly regarded as market participant activity New Jersey's action in threatening to withdraw subsidies to private transportation companies for agreement with unions to cost of living clauses. The court relied heavily on the analogy to a private consumer who attempts to exert pressure on parties to collective bargaining negotiations in order to hold down the costs of services. The court held that New Jersey's exercise of its contracting power was not preempted by the NLRA since Congressional intent to preempt was not implied. *Id.* at 1029. This indicates a recognition that a state's contracting power could not be preempted by the NLRA in the absence of a specific indication of Congressional intent to preempt.

The Wisconsin statutes constitute an exercise of the state's contracting powers under *Byrne* since they involve the state's action, similar to a private consumer, in determining trading parties. They should also not be preempted by the NLRA in the absence of an indication of Congressional intent to preempt.

The NLRA contains no expression of intent to preempt state laws relating to the state's exercise of its contracting powers. Accordingly, the Wisconsin statutes are not preempted by the NLRA since there is no indication of Congressional intent to preempt them.

CONCLUSION

For the foregoing reasons, the judgment of the U.S. Court of Appeals for the Seventh Circuit should be reversed.

RESPECTFULLY SUBMITTED,

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